Supreme Court, U.S.
FILED

93187 1 MAY 19 1994

OFFICE OF THE CLERK

No._____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

GERALDO ANTONIO URREGO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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54 pp

QUESTION PRESENTED

WHETHER EVIDENCE OF A DEFENDANT'S ACTIVITY WHICH ESTABLISHES NO DIRECT NEXUS TO THE CRIME AND IS EXPLAINABLE IN WAYS OTHER THAN PARTICIPATION IN A CONSPIRACY, IS SUFFICIENT TO PROVE A CONSPIRACY EXISTED AND HE KNOWINGLY AND VOLUNTARILY JOINED THE CONSPIRACY.

LIST OF ALL PARTIES

1. Geraldo Antonio Urrego

2. Donald E. Ervin

3. United States of America

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF ALL PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

JURISDICTION 1

CONSTITUTIONAL, STATUTORY, AND FEDERAL SENTENCING GUIDELINES PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 12

CONCLUSION 14

APPENDIX A 1a

APPENDIX B 4a

APPENDIX C 33a

TABLE OF AUTHORITIES

Cases **Page**

United States v. Galvan,
693 F.2d 417, 419 (5th Cir. 1982) 8, 11

United States v. Maltos,
985 F.2d 743 (5th Cir. 1992) 8, 11

United States v. Ornelas-Rodriguez,
12 F.3d 1339 (5th Cir. 1994) 7

Rule and Statutes

21 U.S.C. 841(a)(1) and (b)(1)(A) 2

21 U.S.C. 846 3

28 U.S.C. §1254 2

Supreme Court Rule 10.1 2

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Geraldo Antonio Urrego, praying that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued on February 18, 1994, files this his Petition for Writ of Certiorari, saying more particularly in support thereof as follows:

JURISDICTION

The judgment of the Court below (Appendix A) was entered on September 3, 1992. Petitioner appealed from this judgment to the United States Court of Appeals for the Fifth Circuit. The judgment of the District Court was affirmed. Petitioner timely filed a Petition for Rehearing. The Court below entered an Order (Appendix B) denying the petition on

February 18, 1994. This petition is filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgment on Petition for Certiorari rests upon Section 1254(1) of the Judicial Code (28 U.S.C. § 1254) and Supreme Court Rule 10.1.

CONSTITUTIONAL, STATUTORY, AND FEDERAL SENTENCING GUIDELINES PROVISIONS INVOLVED

21 U.S.C. § 841 (a) (1) ;

> "...to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;"

21 U.S.C. § 841 (b) (1) (A)

> "In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000 or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000 or both. Any sentence imposing a term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction,

> impose a special parole term of at least 6 years in addition to such term of imprisonment."

21 U.S.C. §846:

> "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

STATEMENT OF THE CASE

Petitioner was charged, pursuant to 21 U.S.C. 841(a)(1) and (b)(1)(A), by a two-count indictment with possession with intent to distribute approximately 47 kilograms of cocaine and conspiracy to possess with intent to distribute approximately 47 kilograms of cocaine, respectively. Petitioner pled not guilty.

On April 13, 1992, trial commenced and a verdict of guilty was reached by the jury on both counts of the indictment on April 22, 1992. On August 27, 1992, Appellant was sentenced pursuant to the Federal Sentencing Guidelines to 292 months incarceration plus ten years supervised release time, participation in a drug program and a $25,000 fine as to each count. Appellant thereafter gave timely and proper notice of appeal.

This is a case arising from the discovery of approximately 47 kilograms of cocaine in an automobile at the Sarita Border Patrol checkpoint. Cynthia Cruz, a co-defendant in the case, testified for the Government at trial

that shortly after meeting Petitioner Urrego at a club in Houston and establishing a romantic relationship with him, Petitioner asked her to pick up some important real estate papers up from his brother in Guatemala.

Ms. Cruz ultimately went with a girlfriend and her two children to Guatemala for that purpose. She went back to the home of Cesar Urrego, brother of Petitioner, where she obtained the "papers." However, she was told that she could not leave until she talked to Petitioner by phone, which she was unable to accomplish. When this was finally accomplished, Petitioner was told on the phone in the presence of Ms. Cruz by an acquaintance of Cesar's that he wanted Ms. Cruz to drive a car back to Houston rather than flying.

Cruz subsequently talked to Petitioner and told him she wanted to go home; that she had the papers. Petitioner told her he would send her money but that he wanted the car brought back to him "because Oscar didn't want it anymore." Her return airline tickets were taken from her and she was directed to drive the car back to Houston.

The car subsequently broke down. Petitioner sent Cruz money to fix the car and for her return trip to Houston. She picked the money up at Western Union in Guatemala City. The car was ultimately fixed, paid for; and the journey to Houston began. During the first two days of the trip, Cruz talked to Urrego on the phone and told him that "we were on our way." She talked to him on another occasion and an alleged co-conspirator told her after completing the call that she could not talk to him anymore on the phone because "all he does is make you cry..." The alleged co-conspirator insisted she stay another day on the road but Petitioner told her on the phone that "I don't know why they're telling you to stay another day, you know, you can

come home" The alleged co-conspirator became angry, took the envelope away from Cruz, took her luggage away from her, and Ms. Cruz and Mrs. McKinney and her children drove across the border into the United States.

Cruz and McKinney began to get suspicious because the envelope containing the "papers", the very reason for their trip to Guatemala had been taken from them. They wondered why they were driving the car to Houston. They speculated that drugs might be in the car.

Cruz then stopped at the Sarita Border Patrol checkpoint where a series of events led to the discovery of cocaine in the automobile driven by Ms. Cruz. Cruz subsequently talked to Rick Warren with the DEA and related the circumstances of her driving the car to him over the telephone at the checkpoint. While the DEA was on its way, Ms. Cruz continued talking to the Border Patrol. A picture of Petitioner and Ms. Cruz standing together at the club at which they met, was identified and offered into evidence. Cruz testified that the picture was discovered at the checkpoint and that the border patrol asked "is this the guy we're looking for?" and she replied, "No, this is my boyfriend."

She testified that Petitioner gave her a camera for the trip and told her to take lots of pictures. Ms. Cruz further testified that she was told by Petitioner that he would pay her $3,000.00 to make the trip and pay Ms. McKinney $2,000.00 to make the trip with her.

Agent Warren subsequently took Ms. Cruz to the DEA office in Corpus Christi. There Agent Warren questioned Ms. Cruz and began making physical advances toward her saying "If you help me, I'll help you."

Cruz further testified:

"Well, when I saw he had his arm around me and that he was rubbing on my leg, I knew what he wanted, I knew what he was getting at."

And,

A. Well, when I saw he had his arm around me and that he was rubbing on my leg, I knew what he wanted, I knew, I knew what he was getting at.

Q. You had an idea of what he was getting at? What happened after that, ma'am?

A. He started unzipping his pants and he pulled, he pulled it out.

Q. And what happened then?

A. And he just kept telling me, he told me that, "If you help me, I'll help you." And then he kind of like was pushing me over, and I knew that's what he wanted me to do.

Q. How was he pushing you over, ma'am?

A. Like he was just like leaning my head over.

Q. Was there a sex act at that time?

A. Yeah, I was giving him a blow job, and that wasn't working and he got me up and he turned me around and like started pulling up my dress and pulling my panties --

Q. Did he have --

A. --panty hose down.

Q. What happened after that, ma'am? Did he say that he was going to help you or any such thing as that?

A. He didn't say it anymore after that.

It was on this occasion, immediately after the sex act, that Agent Warren told Ms. Cruz that she had to "get a hold of Geraldo because if we didn't get a hold of him that it was going to be all on me."

Ms. Cruz subsequently had two phone conversations with Petitioner from the DEA office. In these conversations, Petitioner agreed to send $200.00 to Cruz by Western Union under the name of Tony Cruz. The money was picked up by Ms. Cruz and arrangements were made for her to meet Petitioner at the Marriott Hotel in order to "get him to talk about if he knew anything about what was in the car."

Later, at the Marriott Hotel, Ms. Cruz was not able to get Petitioner "to talk about if he knew anything about what was in the car." Petitioner was arrested at that location.

At a later date, Ms. Cruz pled guilty to a conspiracy in this case. This was accomplished on a Friday and she

stayed over on the weekend to assist in Government preparation of the trial against Petitioner and his co-defendants. At that point she had not told anyone about the incident with Agent Warren. However, despite her discouragement, Agent Warren came to the hotel room where Ms. Cruz was staying with Ms. McKinney and had sexual intercourse again with Ms. Cruz in the presence of Ms. McKinney. Ms. McKinney then told a DEA Agent named Irr about the incident and from there the information was disseminated to both the prosecution and the defense.

Ms. Cruz responded to the question:

Q: Did you tell these agents that you believed Warren when he told you that he was going to try to help you regarding the drug charges.

A: Yes sir.

And also responded:

Q: You were afraid if you didn't co-operate with Mr. Warren, you'd get in trouble; is that correct?

A. Yes sir.

Testimony was also had that Mr. Urrego identified himself as Antonio Perez to two DEA Agents when he was being initially processed.

Also, there was testimony at trial that a Texas Certificate of Title to the Chevrolet Automobile driven by Ms. Cruz from Guatemala was found in a briefcase belonging to Petitioner. The owner on the title was not Petitioner but "Mobile Producing Texas and New Mexico."

In affirming Petitioner's conviction, the Fifth Circuit Court of Appeals ruled that this evidence was sufficient to support Petitioner's conviction. *See*, ***United States v. Ornelas-Rodriguez***, 12 F.3d 1339 (5th Cir. 1994). (Appendix C).

On page seven (7) of the Fifth Circuit's Opinion, the Court states:

> "The jury may rely on presence or association in conjunction with other evidence but mere presence at the scene or a close association with the conspirators, without more, is an insufficient basis for inferring participation. *United States v. Maltos*, 985 F.2d 743 (5th Cir. 1992). Furthermore, placing a defendant in a "climate of activity that reeks of something foul" is not enough to support a conspiracy conviction. *United States v. Galvan*, 693 F.2d 417, 419 (5th Cir. 1982)."

An in depth reading of the cases cited by the Court reveals not only a rationale that "mere presence at the scene", a "close association", or a "climate that reeks of something foul" is not enough to support a conspiracy conviction. The clear, overriding rationale of the cases is that persons should not be convicted of participation in a conspiracy when their activity has no direct nexus to the crime and is explainable in ways other than by participation in the conspiracy. Activity which is merely suspicious, even when it "reeks of something foul" does not suffice as proof beyond a reasonable doubt.

The Court, in its opinion, on page eight (8) and continuing on page nine (9) lists its reasons for finding that the evidence was sufficient in this case to support Mr.

Urrego's conviction. In each and every instance, activity is described which is not elevated above reeking of "something foul" to a character of evidence which in any way proves participation. These facts create no nexus between Mr. Urrego and participation in a conspiracy. While "reeking of something foul", they, in every instance, don't bridge the gap between participation in a conspiracy and innocent behavior that is explainable by theories other than guilt.

1. In the first instance, the Court observes that "everyone Cruz met in Guatemala was associated with Urrego and the jury rejected the argument that it was a coincidence that Garcia and Lopez were in Guatemala at the same time."

Certainly, Cruz, sent to Guatemala by Urrego, would meet with only persons associated with Urrego regardless of what errand Urrego intended her to perform. Also, the fact that Garcia and Lopez were in Guatemala at the same time can be explained in a myriad of ways other than that Urrego was part of the conspiracy, eg., that Garcia and Lopez availed themselves of the opportunity to use Cruz for a purpose other than what was intended by Urrego.

2. The Court observes that "Urrego was one of the others contacted whenever a problem arose and he sent money when it was needed."

Without question, this fact comports with innocent intention in that Urrego would naturally feel an obligation to care for the needs of one he sent to Guatemala.

3. The Court's observation that "it was Urrego who ultimately convinced Cruz to drive the car back to Texas" can easily be explained in a number of ways other than guilt, eg, that for the reasons inconsistent with the

conspiracy he wished to accommodate those who wanted the car returned, he wanted the car himself in the States, and he could return Cruz all in one activity.

4. The court observes that "both Ornelas and Garcia had telephone numbers linking them to Urrego", but association even "close association" with these individuals has been determined to be insufficient to establish Urrego's participation in the conspiracy.

5. The observation that Urrego was unconcerned with the real estate papers Cruz had been sent to retrieve is, in the estimation of Petitioner, a conclusion drawn which is inadequately supported by the record. Were this an accurate observation, though, there are obviously many reasons why he might have had his attention diverted other than participation in a conspiracy.

6. Additionally, Urrego's concern with the car could have been caused by a number of reasons other than knowledge it contained cocaine, and, concern that police will be contacted in any facet of human affairs is not unusual on the part of an person, especially one accustomed to police intervention in Latin American Countries.

7. The Court observes that "Urrego used an alias on two occasions, once when he tried to send Cruz money and again when he was booked,"

In the first instance, when Urrego tried to send Cruz money, the clear intent of Urrego was to facilitate delivery by sending from "Cruz" to "Cruz". No other logical reason for this exists. In the second instance, the fact that Urrego gave an alias when arrested has been in many cases, and can be in this case, associated with a desire to limit personal involvement with police. There can be many reasons for this

other than participation in a conspiracy. Mr. Urrego, with a Latin American background, might well be more apprehensive than the average American, that any type of involvement with police was to be avoided. An arrest and release without them knowing his true identity might well have been considered by him to be the most advisable tact, even though he was not guilty of anything. But, perhaps, he was concerned about apprehension for a crime that he had committed. That crime needn't necessarily be participation in the instant conspiracy. The point is that there is no way of knowing what his reasons were for giving this alias.

REASONS FOR GRANTING THE PETITION

The United States Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such departure by a lower court, in its Opinion in this case, as to call for an exercise of this Court's power of supervision. *See*, Supreme Court Rule 10.1.

The United States Court of Appeals for the Fifth Circuit correctly cited the applicable law concerning sufficiency of evidence in this case in its reference to *United States v. Maltos*, *supra*, and *United States v. Galvan*, *supra*, however, by way of departing from the accepted and usual course of judicial proceeding. That is, by applying the law incorrectly to the facts of this case, they have invited the exercise of this Court's power of supervision.

In sanctioning the conduct of the lower court in overriding Petitioner's timely Motion for Judgment of Acquittal, the court likewise invites this Court's power of supervision.

The principals of justice and fair dealing, and a commitment to the worth of the individual in our society demand that persons should not be convicted of participation in a conspiracy when their activity has no direct nexus to the crime and is explainable in ways other than participation in the conspiracy. To sanction the lower court's conviction for activity which is merely suspicious, even when it "reeks of something foul," is unconscionable. Such evidence cannot suffice as proof beyond a reasonable doubt.

In our fervor to deal with the drug problem in the United States, our courts have, as in the instant case, interpreted the law with an eye toward conviction and affirmance. The law has been bent to achieve a result. The appellate court's finding in this case is simply the result of aggregating activities of Petitioner which do not rise to the requisite sufficiency and only "reek of something foul" and find proof beyond a reasonable doubt from their aggregation. It is of paramount importance that this Court consider this departure from the accepted and usual course of judicial proceeding by the United States Court of Appeals for the Fifth Circuit and decide whether its finding of sufficiency under these circumstances should be permitted.

The said departure of the lower court in this case makes possible the conviction of an individual involved in suspicious activity even though he is innocent with regard to the crime. The rule of law should stand between the emotional reaction of the layman to suspicious activity and the conviction of a defendant where evidence does not tie him directly to a crime.

CONCLUSION

The United States Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings in finding the lower courts determination of sufficiency of evidence for conviction in this case as to call for an exercise of this Court's power of supervision. This power must be exercised to avoid a rationale on the part of the Court below which would permit the conviction of an innocent individual who is merely engaged in suspicious activity. The petition should be granted.

Respectfully submitted,

Donald Edward Ervin
Attorney for Petitioner
1018 Preston, 7th Floor
Houston, Texas 77002
(713) 223-1622
State Bar No. 06640400
Federal Admissions No. 6462

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

United States district Court
Southern District of Texas

ENTERED
Sept 2-1992

United States District Court

SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTY DIVISION

SEPT 2-1992
Jesse E. Clark, Clerk

Jesse E. Clark, Clerk
By Deputy: illegible

UNITED STATES OF AMERICA
v.

JUDGEMENT IN A CRIMINAL CASE
(For offenses Committed On or After November 1, 1987)

Gerardo Antonio Urrego

Case Number :C-91-00382-05

(Name of Defendant)

Arnold Cohn
Defendant's Attorney

HE DEFENDANT:

☐ pleaded guilty to count(s)_____

☒ was found guilty on count's 1 and 2 on april 22, 1992 after a plea of not guilty.

According, the defendant is adjudged guilty of such count(s), Which involve the following offenses:

Title and Section	Nature of offense	Date Offense Concluded	Court Number(s)
:841(a)(1) & ( )(1)(A)	POSSESSION WITH INTENT TO DISTRIB-APPROXIMATELY 47 KILLAGRAMS OF COCAINE	11/26/92	1
:846, 41(a)(1) & (b)(1)(A)	CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE APPROXIMATELY 47 KILOGRAMS OF COCAINE	11/27/92	2

The defendant is sentenced as provided in pages 2 through 4 of this judgement. The sentence is imposed pursuant to the

Sentencing Reform Act of 1984 OF 1984.

☐ The defendant has been found not guilty on count(s)_____ and is discharged as to such count(s).

☐ Count(s) _____(is)(are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $ 100.00 , for court(s) 1 and 2 ,which shall be due ☒ immediately ☒☒ as follows: CLERK, UNITED STATES DISTRICT COURT,, 521 STARR STREET, CORPUS CHRISTI, TX 78401

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 10 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments are fully paid: UNITED STATES ATTORNEY'S OFFICE, Financial Litigation Unit, P.O. Box 61129, HOUSTON TX 77208.

Defendant's Soc. Sec. No.: 451-83-0578

Defendant's Date of Birth: 07/07/56

August 27, 1992
Date of imposition of sentence

Defendants Mailing Address:

/s/ HAYDEN w. MEAD,Jr.
Signature of Judicial Officer

3355 n. borough No. 107
Houston, Texas 77096

HAYDEN W. MEAD, Jr.
UNITED STATES DISTRICT JUDGE
Name and Title of Judicial Officer

Defendants Residence Address:

9-2-92
Date

same

Defendant: GERARDO ANTONIO URREGO Judgement-Page 2 or 4

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWO HUNDRED NINETY-TWO (292) MONTHS. The term consists of 292 months in each of Counts 1 and 2, to be served concurrently.

☒ The court makes the following recommendations to the Bureau of Prisons: That the defendant be deported upon completion of incarceration.

☒The defendant is remanded to the custody of the United States marshal.
☐The defendant shall surrender to the United States marshal for this district.

a.m.
☐ at_____p.m. on_____
☐ as notified by the United States marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
☐ before 2 p.m. on _____
☐ as notified by the United States marshal.
☐ as notified by the probation office.

RETURN

I have executed this judgement as follows:

_____

_____

Defendant delivered on _____to_____
at_____with a certified copy of this judgement.

_____
United States Marshal

By_____
Deputy Marshal

APPENDIX B

U.S. COURT OF APPEALS
F I L E D
FEB 18 1994
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7596

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SERGIO ORNELAS-RODRIGUEZ,
EDUARDO LOPEZ-GUTIERREZ,
ROGELIO ALEJANDRO GARCIA and
GERALDO ANTONIO URREGO,
Defendants-Appellants.

Appeals from the United States District
Court for the Southern District of Texas

ON PETITION FOR REHEARING

(February 18, 1994)

Before DUHÉ, EMILIO M. GARZA, Circuit Judges, and BLACK, District Judge.[1]

PER CURIAM:

IT IS ORDERED that the petition for rehearing, as to Geraldo Antonio Urrego, filed in the above entitled and numbered cause be and the same is hereby *denied*.

ENTERED FOR THE COURT

/s/ illegible
United States Circuit Judge

CLERK'S NOTE: SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

---

[1] Chief Judge of the Southern District of Texas, sitting by designation.

UNITED STATES of America,
Plaintiff-Appellee,
v.
Sergio ORNELAS-RODRIGUEZ, Eduardo Lopez-Gutierrez, Rogelio Alejandro Garcia, and Geraldo Antonio Urrego,
Defendants-Appellants.

No. 92-7596

United States Court of Appeals,
Fifth Circuit.

Jan. 19, 1994

Rehearing Denied Feb. 18, 1994.

Defendants were convicted in the United States District Court of the Southern District of Texas, Hayden W. Head, Jr., J. of conspiracy and possession with intent to distribute cocaine, and they appealed. The Court of Appeals, Norman W. Black, District Judge, sitting by designation, held that: (1) evidence supported convictions; (2) finding that confession was not coerced was not clearly erroneous; (3) mistrial was not warranted by rebuttal witness' refusal to testify; (4) any error in court's casual comment during voir dire was cured by passage of time and by jury charge; and (5) fact that law enforcement had sex with one defendant's girlfriend while interrogating her did not warrant exercise of court's supervisory power to reverse conviction.

Affirmed.

1. Criminal Law 1144.13(2.1), 1159.2(8)

In reviewing sufficiency of evidence to support conviction, court views all evidence and all inferences drawn from evidence, in light most favorable to verdict and affirms conviction if evidence so viewed would permit rational jury to find all elements of crime proven beyond reasonable doubt; further, it is not necessary for evidence to exclude every rational hypothesis of innocence or to be wholly inconsistent with every conclusion except guilt, provided that rational jury could find that the evidence establishes guilt beyond reasonable doubt.

2. Criminal Law 1159.2(1)

Court reviewing sufficiency of evidence to support conviction must not concentrate on whether trier of fact made the correct guilt or innocence determination, but rather must decide whether trier of fact made rational decision to convict.

3. Conspiracy 28(3)

To prevail in drug conspiracy prosecution, government must prove beyond reasonable doubt that agreement existed between two or more individuals to violate narcotic laws, that defendant was aware of the agreement, and that defendant voluntarily participated in the agreement; existence of these elements may be inferred from development and collocation of circumstances. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

4. Conspiracy 44,2, 47(2)

In prosecution for drug conspiracy, jury may rely on defendant's presence at scene or association with other

conspirators in conjunction with other evidence to infer that defendant participated in conspiracy, but mere presence at scene or close association with conspirators, without more, will not suffice; furthermore, placing defendant in a climate of activity that reeks of something foul is not enough to support a conspiracy conviction. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

5. Conspiracy 5

Evidence of overt activity is not required to convict defendant of drug conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

6. Conspiracy 47(12)

Drugs and Narcotics 123(2)

Finding that defendant voluntarily participated in conspiracy to possess with intent to distribute cocaine and knowingly possessed cocaine was supported by evidence that defendant convinced girlfriend to go to Mexico for stated purpose of picking up real estate documents, that everyone girlfriend met in Mexico was associated with defendant, that defendant convinced girlfriend to drive back from Mexico in associate's car and that large quantity of cocaine was found in that car when it was stopped and searched. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

7. Conspiracy 47(12)

Finding that defendant voluntarily participated in conspiracy to possess with intent to distribute cocaine was supported by the circumstantial evidence; defendant

accompanied conspirator to airport when conspirator's girlfriend flew to Mexico, defendant went with conspirator to hotel to meet girlfriend after she had driven car containing cocaine back from Mexico, defendant had title to car in which other conspirator had followed girlfriend back from Mexico, address listed on car title did not exist and defendant associated with other members of conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401 (a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

8. Drugs and Narcotics 73.1

Proof of actual possession is not required to support conviction for possession of narcotics; constructive possession of narcotics will support conviction and is established by evidence of defendant's ownership, dominion, and control over the narcotics. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§401(a)(1), 406, 21 U.S.C.A. 841(a)(1), 846.

9. Drugs and Narcotics 76

Proof of actual possession is not required to convict participant in drug conspiracy of possession of narcotics, even the elements of constructive possession are clearly present; conspirator is liable for substantive offenses of coconspirators while he is member of conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

10. Conspiracy 47(12)

Finding that defendant voluntarily participated in conspiracy to possess with intent to distribute cocaine was supported by evidence that defendant arrived at narcotics checkpoint shortly after cocaine was found in car which

conspirator's girlfriend was driving, that defendant knew and had been photographed with conspirator's girlfriend, that defendant owned car which girlfriend was driving, that defendant told conspirator that they should have waited another day, and that defendant associated with another conspirator as well. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

11. Conspiracy 47(12)

Finding that defendant voluntarily participated in conspiracy to possess with intent to distribute cocaine was supported by evidence that defendant drove car in which he and a conspirator followed second conspirator's girlfriend as she drove car containing cocaine from Mexico to United States, that car which defendant was driving contained phone numbers for other conspirators and spare keys to car which girlfriend was driving, that defendant took from girlfriend all evidence that he had been in Mexico, and that defendant hesitated to comply with instructions given to him at narcotics checkpoint. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

12. Criminal Law 531(3)

District court did not clearly err in concluding that defendant's confession was not coerced, despite defendant's claim that reason he confessed was that he saw cofelon beaten by Drug Enforcement Agency (DEA) task force officer, based on testimony from another DEA officer that, several hours after cofelon's beating, defendant knowingly and voluntarily waived his *Miranda* rights when he was told that cofelon had confessed and that there were advantages to cooperating. U.S.C.A. Const.Amend. 5.

13. Criminal Law 1158(4)

When reviewing ruling from suppression hearing, court must give credence to credibility choices and findings of fact of district court unless clearly erroneous, and finding is "clearly erroneous" only when reviewing court is left with definite and firm conviction that a mistake has been made.

See publication Words and Phrases for other judicial constructions and definitions.

14. Criminal Law 1134(3)

Ultimate issue whether confession is voluntary is legal question requiring the reviewing court to make an independent determination. U.S.C.A. Const.Amend. 5

15. Criminal Law 519(1)

Confession is "voluntary" if, taking into consideration the totality of the circumstances, it is product of the accused's free and rational choice and is made with awareness of right being abandoned and consequences of that decision. U.S.C.A. Const.Amend. 5.

16. Criminal Law 412.2(5)

If one voluntarily, knowingly, and intelligently waives constitutional privilege against self-incrimination, statement is not considered "compelled" within the meaning of the Fifth Amendment. U.S.C.A. Const.Amend. 5.

See publication Words and Phrases for other judicial constructions and definitions.

17. Criminal Law 662.6

Defendant's Sixth Amendment right of cross-examination was not violated when police officer called by defense as rebuttal witness to test credibility of government witness invoked the Fifth Amendment. U.S.C.A. Const.Amend. 5, 6.

18. Criminal Law 706(7), 867

Witness' invocation of his Fifth Amendment rights may warrant mistrial if government makes a flagrant attempt to build its case on inferences arising from assertion of the privilege, or if refusal to answer adds considerable weight to government's case. U.S.C.A. Const.Amend. 5.

19. Criminal Law 867

Although government witness' invocation of privilege against self-incrimination may, under some circumstances, warrant mistrial, mistrial is not warranted by refusal to testify of rebuttal witness called by defendant. U.S.C.A. Const.Amend. 5.

20. Criminal Law 1166.22(4.1)

District court did not mislead jury as to government's burden of proof by commenting during voir dire that, after jury service, jurors could go to church and pray that they had made the right decision, where statement was made 11 days before jury began deliberations and jury charge included detailed instructions on presumption of innocence and proof beyond reasonable doubt; any error resulting from court's casual remark was cured by passage of time and by court's detailed instructions. U.S.C.A. Const.Amends. 5, 6.

21. Criminal Law 1144.15

It is presumed that jurors follow their instructions.

22. Criminal Law 36.6
Federal Courts 523

Court would not exercise its supervisory powers to set aside conviction, even though Drug Enforcement Agency (DEA) task force officer had sex with defendant's girlfriend while interrogating her and then told her that she would be blamed for crime unless government could obtain evidence against defendant, where girlfriend testified that she would have assisted government even if she had not had sex with DEA task force officer, evidence against defendant was independent of the sexual activity, and there was no evidence that government or court had sanctioned officer's conduct. U.S.C.A. Const.Amend. 5.

23. Federal Courts 523

Purposes of court's supervisory powers to set aside conviction for government misconduct are to implement remedy for violation of recognized right, to preserve judicial integrity by ensuring that conviction rests on appropriate considerations validly before jury, and to deter further illegal conduct.

24. Federal Courts 523

Reversal of conviction under court's supervisory powers should be approached with some caution.

25. Federal Courts 523

Use of court's supervisory power to reverse conviction for government's misconduct is not necessary when error to which remedy would be addressed is harmless. harmless.

Amador C. Garcia, Corpus Christi, TX (Court-appointed), for Rogelio Alejandro Garcia.

Paul D. Inman, Gibson, Dunn & Crutcher, Dallas, TX (Court-appointed), for Eduardo Lopez-Gutierrez.

Frank Garza, Corpus Christi, TX (Court-appointed), for Sergio Ornelas-Rodriguez.

Don Ervin, Houston, TX, for Geraldo Antonio Urrego.

Timothy G.E. Hammer, Paula C. Offenhauser, James L. Turner, Asst. U.S. Attys., Ronald G. Woods, U.S. Atty., Houston, TX, for U.S.

Appeals from the United States District Court for the Southern District of Texas.

Before DUHÉ, EMILIO M. GARZA, Circuit Judges, and BLACK, District Judge.[1]

NORMAN W. BLACK, District Judge:

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[1] Chief Judge of the Southern District of Texas, sitting by designation.

Defendants, Sergio Ornelas-Rodriguez ("Ornelas"), Eduardo Lopez-Gutierrez ("Lopez"), Rogelio Alejandro Garcia ("Garcia") and Geraldo Antonio Urrego ("Urrego"), were tried jointly before a jury and convicted of possession with intent to distribute approximately 47 kilograms of cocaine and with conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C.A. §§ 841(a)(1), (b)(1)(A) and 846. All four defendants now appeal their convictions. We AFFIRM the district court in all respects.

I.

Cynthia Cruz met co-defendant Urrego at a party on October 31, 1991 and they became romantically involved. Urrego introduced her to co-defendants Garcia and Lopez. Urrego told Cruz he was in the real estate business and asked her to go to Guatemala to pick up some important papers from his brother. She agreed to go and was accompanied by her friend McKinney and her two children. The women were taken to the airport by Urrego and Lopez.

After picking up the papers in Guatemala, Oscar Lopez told Cruz he had purchased a Chevrolet from Urrego that he was unhappy with and asked her to drive it back to Texas. Cruz spoke with Urrego on the telephone and he told her to make the return trip in the automobile. The car was allegedly in need of repair, and Urrego sent Cruz money so this could be done.

The women left for Houston and in Tapachula they were met by Garcia and Ornelas who informed them that they would be following them through Mexico in a red Mustang. All evidence showing Cruz and McKinney had been in Guatemala was taken from them including the papers Cruz was sent to retrieve. When the women arrived in Matamoros they were told to wait one more day before

entering the United States. Cruz called Urrego and informed him she was coming home. He accepted her decision.

When Cruz arrived at the Sarita Border Patrol Checkpoint, Agent Guillen asked if he could inspect the trunk. Cruz consented. When Guillen opened the trunk he detected a strong order of mothballs and glue and noticed that the trunk was not as deep as it should have been. Cruz was directed to the secondary inspection area where the car was inspected by a canine unit. The dog alerted as it was brought toward the trunk of the vehicle. Guillen then drilled holes into the trunk and a white power was extracted which tested positive for cocaine. Agents discovered a total of 49 bundles of cocaine in the car.

Cruz and McKinney were interrogated by Guillen in an office overlooking the primary inspection area. Three hours after the women were detained the Mustang arrived at the checkpoint. McKinney began screaming "It's them!" and dove for the floor. The driver was Ornelas and Garcia was his passenger. The vehicle and its occupants were detained at the primary checkpoint. When Ornelas was told to turn off the car and get out he hesitated. Agents believed he was contemplating an escape and physically removed Ornelas from the car. Both men were very nervous.

Agents searched the Mustang and found a tourist entry document for entry into Mexico in the names of Garcia and Ornelas, a page with three phone numbers and two duffle bags. One of the bags contained a set of keys to the Chevrolet driven by Cruz. Ornelas admitted these were his bags but during the interrogation Garcia said the keys belonged to him. On the way to the holding cell Agent McGuire overheard Garcia tell Ornelas that if they had waited one more day (until Thanksgiving) they would not have been caught.

Both Garcia and Ornelas claimed they did not know Cruz or McKinney and that they had come down from Houston to visit family in San Juan de los Lagos. When Garcia was shown a photograph of him embracing Cruz he admitted he had met her at a club in Houston and loaned her his car.

Warren, a Corpus Christi police officer assigned to the DEA Task Force, interviewed Cruz. The conversation digressed and according to Cruz he made sexual advances toward her. He told her that if she cooperated he would help her and she complied. Afterwards, Warren told Cruz she had been used by Urrego and that if she did not help them apprehend him the brunt of the offense would fall on her. Cruz was told to call Urrego and lure him to Corpus Christi. She called Urrego and told him the car had broken down and he agreed to come and help her.

The DEA arranged for video and audio surveillance at the Marriott Hotel and Cruz was given a "bug". When Urrego and Lopez arrived at Cruz' room McKinney was allegedly out with the car. Cruz told them the car had been stopped and searched outside Vera Cruz by Mexican officials and that after the search she said "Pancho" had told her everything. Lopez got up and suggested they wait for McKinney in the lobby. As they were leaving the room, three officers emerged from an adjacent room and told the men to stop. Lopez appeared to reach for his beltline so the officers drew their guns and forced Urrego and Lopez into the elevator. Lopez, who did not have a weapon, was restrained. Urrego was hit several times in the head and kicked in the stomach. His vehicle was seized and the suspects were taken to DEA headquarters.

Urrego, who gave a false name, was interviewed by Agent Irr; however, the interview stopped when Urrego

asked for an attorney. Urrego's briefcase was found in his car and it contained telephone records for a Lilia Colmenares of Houston. Several calls from Guatemala and Matamoros were on the statement. Urrego claimed he lived at the Houston address on the Colmenares bill. It was also discovered that the three phone numbers on the paper found in the Mustang all belonged to Urrego.

Agent O'Brien interviewed Lopez who told him he had been staying in a LaQuinta Inn in Houston "waiting for a load" which he thought was a load of cocaine. He knew two women would be bringing it into the country because he had taken them to the airport.

Cruz, McKinney, Ornelas, Garcia, Urrego and Lopez were indicted on December 11, 1991 and charged with possession with intent to distribute approximately 47 kilograms of cocaine and with conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(A) and 846. Cruz decided to plead guilty and cooperate with the government.[2] Lopez, Ornelas, Garcia and Urrego pled not guilty and all four were convicted by a jury.[3]

The district court sentenced Rodriguez and Garcia to 169 months each. Lopez received a term of 121 months. Their sentences were to be followed by concurrent five-year terms of supervised release. Urrego was sentenced to a 292

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[2] When Cruz came to Corpus Christi to help the government prepare for trial Agent Warren came to her hotel room and forced her to have sex with him a second time. She had told no one of the first incident but this time the act was done in McKinney's presence. McKinney reported the incident to agent Irr.

[3] After Cruz testified at trial the charges against her and McKinney were dismissed on the government's motion.

month term of confinement to be followed by concurrent 10-year terms of supervised release. Rodriguez, Garcia and Lopez were each ordered to pay a fine of $1000.00 and Urrego's fine was assessed at $25,000.00. All four defendants were ordered to pay the mandatory special assessment of $100.00 each.

II.

[1,2] All four defendants first raise the claim that the evidence was insufficient to sustain their convictions. In reviewing the sufficiency of the evidence, this Court views all evidence, whether direct or circumstantial, and all inferences drawn from this evidence, in the light most favorable to the verdict. *United States v. Madison*, 990 F.2d 178, 181 (5th Cir. 1993). The conviction should be affirmed "if the evidence so viewed would permit a rational jury to find all elements of the crime proven beyond a reason doubt. . . ." *United State v. Roberson*, 6 F.3d 1088, 1093 (5th Cir. 1993). "It is not necessary that the evidence exclude every rational hypothesis of innocence or be wholly inconsistent with every conclusion except guilt, provided a reasonable trier of fact could find the evidence establishes guilt beyond a reasonable doubt." *United States v. Pruneda-Gonzalez*, 953 F.2d 190, 193 (5th Cir.), *cert. denied*,— U.S. —, 112 S.Ct. 2952, 119 L.Ed.2d 575 (1992). The Court must not concentrate on "whether the trier of fact made the correct guilt or innocence determination, but rather whether it made a rational decision to convict or acquit." *Herrera v. Collins*, — U.S. —, —, 113 S.Ct. 853, 861, 122 L.Ed.2d 203 (1993).

[3] To prevail in a drug conspiracy prosecution brought pursuant to 21 U.S.C. §§ 841(a)(1) and 846, the government must prove beyond a reasonable doubt that 1) there existed an agreement between two or more individuals

to violate the narcotic laws, 2) defendant was aware of the agreement and 3) defendant was a voluntary participant in the agreement. *United States v. Gallo*, 927 F.2d 815, 820 (5th Cir. 1991). All of these elements may be inferred from the "development and collocation of circumstances." *United States v. Vergara*, 687 F.2d 57, 61 (5th Cir. 1982).

[4] The jury may rely on presence or association in conjunction with other evidence but mere presence at the scene or a close association with the conspirators, without more, is an insufficient basis for inferring participation. *United States v. Maltos*, 985 F.2d 743 (5th Cir. 1992). Furthermore, placing a defendant in a "climate of activity that reeks of something foul" is not enough to support a conspiracy conviction. *United States v. Galvan*, 693 F.2d 417, 419 (5th Cir. 1982).

[5] In order to convict these defendants of possession with intent to distribute narcotics, the government was required to prove beyond reasonable doubt that a conspiracy existed and that each defendant voluntarily participated therein. *United States v. Rodriguez-Mireles*, 896 F.2d 890 (5th Cir. 1990). "No evidence of overt conduct is required." *United States v. Hernandez-Palacios*, 838 F.2d 1346, 1348 (5th Cir. 1988).

All four defendants contend there was insufficient evidence to support their convictions and believe the government failed to show they were knowingly involved in a conspiracy to possess with intent to distribute cocaine. However, direct evidence of an agreement to deal in drugs rarely exists. "A conspiracy agreement may be tacit, and the trier of fact may infer agreement from circumstantial evidence". *Id.* An abundance of evidence was presented by the prosecution which established the existence of the conspiracy and the knowledge of the voluntary participation

in the conspiracy by all four defendants.

Urrego

[6] Defendant Urrego asserts the evidence shows only that he caused Cruz to go to Guatemala and that this was done for the sole purpose of obtaining the real estate papers. He purchased round-trip airline tickets for both Cruz and McKinney. The reason the women returned by car was because his friend in Guatemala wanted them to drive the car back. When his co-defendants insisted that Cruz stay an extra day he told her she could come home. He believes that the fact that he used an assumed name when arrested and had the title to the car in his briefcase is inadequate.

Testimony reflects that everyone Cruz met in Guatemala was associated with Urrego and the jury rejected the argument that it was a coincidence that Garcia and Lopez were in Guatemala at the same time. The evidence showed that Urrego was the one the others contacted whenever a problem arose and he sent money when it was needed. It was Urrego who ultimately convinced Cruz to drive the car back to Texas. Both Ornelas and Garcia had telephone numbers linking them to Urrego. Urrego was unconcerned with the real estate papers Cruz had been sent to retrieve. When he arrived in Corpus Christi his primary concern was the car and whether McKinney would contact the police.

Urrego used an alias on two occasions, once when he tried to send Cruz money and again when he was booked. In addition, the phone numbers in the possession of Garcia and Ornelas in conjunction with the calls from Guatemala and Matamoros tie him to the cocaine.

Resolving all inferences and credibility determinations in favor of the jury's verdict as required by *United States v.*

Santisteban, 833 F.2d 513, 516 (5th Cir. 1987), a rational trier of fact could have found that defendant Urrego voluntarily agreed to and participated in a conspiracy to possess cocaine with the intent to distribute and knowingly possessed cocaine.

Lopez

[7] Defendant Lopez contends that there is only scant circumstantial evidence against him and that the government relied heavily upon his confession. Whether the confession should have been suppressed is addressed in Section III, *infra*. He believes that he was not a target of the investigation and that the government did not know of his existence until he appeared at the hotel in Corpus Christi with Urrego to arrange for the repair of the car.

The circumstantial evidence shows Lopez was associated with some of the other defendants, he went with Urrego when he took Cruz and McKinney to the airport and he repeated the assertion by Cruz that someone "told her everything". Furthermore, a week before his arrest he went to the Department of Transportation to pick up the title to the car driven by a co-defendant at the time of his arrest. The address he gave when the title was issued did not exist.

[8,9] Lopez believes that since he was not found to be in actual possession of the cocaine his conviction must be reversed. Possession may be constructive if the evidence indicated the defendants ownership, dominion and control over the [narcotic]. *United States v. Richardson*, 848 F.2d 509, 512 (5th Cir. 1988). In addition, even if the issues of Lopez's constructive possession with intent to distribute were not clearly present, a conspirator is liable for the substantive offenses of his co-cospirators while he is a member of the conspiracy. *United States v. Garcia*, 917 F.2d 1370, 1377

(5th Cir. 1990) (quoting *United States v. Basey*, 816 F.2d 980, 997 (5th Cir. 1987).

Although much of the government's evidence regarding the participation by Lopez in the conspiracy may have been circumstantial, it was more than sufficient to support the jury's verdict. *See United States v. Martinez*, 975 F.2d 159, 162 (5th Cir. 1992), *cert. denied*, — U.S. —, 113 S.Ct. 1346, 122 L.Ed.2d 728 (1993). Therefore, we find there was sufficient evidence to support the jury verdict.

Garcia

[10] According to defendant Garcia, it was a coincidence that he arrived at the Sarita checkpoint shortly after Cruz and McKinney. He contends he did not know the car driven by Cruz contained cocaine and he was not involved in a conspiracy to bring the drugs across the border.

The testimony shows that Garcia knew Cruz and they had their picture taken together, he owned the car she was driving, was in possession of an extra set of keys to the car and was with her in Tapachula and Matamoros. He also commented to Ornelas that they should have waited another day and the Mustang contained a page of phone numbers linking him to Urrego and Lopez.

Like Lopez, he contends that his conviction must be reversed because he had no actual possession of the cocaine. However, he too had constructive possession because some of his co-defendants had actual or constructive possession and they were his co-conspirators.

The jury refused to accept the premise that all of these events were purely accidental. While each piece of evidence, viewed independently may have been susceptible

of innocent interpretation, we are convinced that the jury reasonably could have concluded that when examined in the aggregate, the evidence sufficed to establish Garcia's guilt.

Ornelas

[11] Defendant Ornelas first appears on the scene in Mexico driving the red Mustang. This is the vehicle which contained Urrego's telephone numbers and the keys to the load-vehicle. He, along with Garcia, was responsible for the security of the load. They relieved Cruz and McKinney of all evidence that they had been to Guatemala and controlled the keys to the vehicle. This, together with the fact that he was driving the Mustang, his conduct in Matamoros and his hesitancy to comply with instructions at the checkpoint make it reasonable for the jury to conclude he was involved in the conspiracy. The district court did not err in accepting the jury's verdict.

III.

[12] Lopez also argues that the district court erred by denying his motion to suppress his confession. He claims that because he was close to Urrego when Urrego was beaten by Officer Warren in the elevator, his later confession at DEA headquarters was coerced and admitted in violation of his due process rights.

[13,14] When reviewing a ruling from a suppression hearing, "[t]his Court must give credence to the credibility choices and findings of fact of the district court unless clearly erroneous." *United States v. Raymer*, 876 F.2d 383, 386 (5th Cir.) *cert. denied*, 493 U.S. 870, 110 S.Ct. 198, 107 L.Ed.2d 152 (1989) (citing *United States v. Watson*, 591 F.2d 1058, 1061 (5th Cir.), *cert. denied*, 441 U.S. 965, 99 S.Ct 2414, 60 L.Ed.2d 1070 (1979)). A finding is clearly

erroneous only when the reviewing court is left with the "definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948)). The ultimate issue of voluntariness, however, is a legal question requiring the reviewing court to make an independent determination. *Raymer*, 876 F.2d at 386 (citations omitted).

The trial court held a four day hearing on pretrial motions. With respect to the motion to suppress of defendant Lopez it found:

> It is at this point where the credibility of these witnesses is the most important. The court does not find that what occurred at the time of the arrest was influential in what occurred that night later at the DEA when the defendant gave his statement. The court recalls that the burden of proof placed upon the government has been recently established and stated in this circuit to be by a preponderance of the evidence, which means whether or not the government has proven that its version of the facts if probably correct, not clear and convincing. Were this a clear and convincing case, the government's burden would not be met. The question is whether or not it is probably true that the defendant was extended his warnings and knowledgeably and voluntarily waived them. And again, in viewing that testimony between O'Brien and Lopez, the court finds that it is probably true that O'Brien is telling the truth and Lopez is not. Not only are the motivational factors different, the court believes that the defendant Lopez convicts his own credibility by the exaggeration of his testimony. He was not to the court a credible

> witness. On the contrary O'Brien was. He remembered generally what happened, he was not sure of other things, and that itself brings a certain degree of credibility to the court. He remembered the most important matters, and that is that the defendant was in no circumstances of physical distress, no circumstances of physically being bound, that he was given the warnings, and that there were basically two separate events of interrogation, the second occurring after the defendant was confronted with information that Urrego himself gave during an illegal inquiry. That type of information is the type of information that would inspire a co-defendant to say according to the government's theory, "The boss has talked, there's no reason for me to be quiet any longer." And the boss had talked. That, to the court is much more credible than a scenario that a DEA officer had threatened to beat, had screamed, had cursed a defendant. It is clearly true the DEA officers and O'Brien included probably pointed out to the defendant the advantages of cooperation. That does not remove free will. The court did not hear circumstances that convinced it that the defendant's free will was jeopardized.

This Court's independent review of the suppression hearing evidence confirms the trial court's findings of fact and must determine what legal conclusions are to be derived from these facts.

[15,16] The standard for determining whether a confession is voluntary is whether, taking into consideration the "totality of the circumstances," the statement is the product of the accused's "free and rational" choice. *Martinez v. Estelle*, 612 F.2d 173, 177 (5th Cir. 1980) (quoting *Greewald v. Wisconsin*, 390 U.S. 519, 88 S.Ct.

1152, 1154, 20 L.Ed.2d 77 (1968)). If a person "voluntarily, knowingly and intelligently" waives his constitutional privilege a statement is not considered compelled within the meaning of the Fifth Amendment. *United States v. Rogers*, 906 F.2d 189, 191 (5th Cir. 1990) (citing *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966)). Not only must the confession be the result of a free and deliberate choice but also made with an awareness of the right being abandoned and the consequences of that decision. *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 1141, 89 L.Ed.2d 410 (1986). A confession does not occur in a vacuum but is a response to a particular fact scenario. *United States v. McCrary*, 643 F.2d 323, 329 (5th Cir. Unit B 1981). Therefore, the issue of whether a confession was voluntary must be reviewed on a case-by-case basis. *Jurek v. Estelle*, 623 F.2d 929, 937 (5th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981).

The admission of the Lopez confession turns upon a credibility choice. The district court's decision to choose the credibility of O'Brien was not clearly erroneous. It believed O'Brien when he said Lopez had been told Urrego had talked and that there were advantages to cooperating. The confession took place several hours after the incident in the elevator and there is absolutely no evidence that Lopez was personally threatened with physical violence if he failed to confess. As a result we affirm the district court's denial of the suppression motion.

IV.

[17] Garcia contends his Sixth Amendment right of cross examination was violated when Officer Warren invoked the Fifth Amendment after being called to testify by Defendant Urrego. Cruz had entered into a plea agreement

and testified against Urrego, Lopez, Garcia and Ornelas. During cross-examination she alleged sexual misconduct during her incarceration at the Sarita Check-point by Officer Warren. Warren was faced with criminal charges stemming from this incident. As a result, Warren was called as a witness by the defense to test the credibility of Cruz when he invoked the Fifth Amendment. The defense then moved for a mistrial and a hearing was held outside the presence of the jury. The motion was denied.

Garcia argues that the Sixth Amendment includes the right of cross-examination of a witness as well as the right of confrontation. *United States v. Witschner*, 624 F.2d 840 (8th Cir.), *cert. denied*, 449 U.S. 994, 101 S.Ct. 532, 66 L.Ed.2d 291 (1980). He contends Cruz was a questionable witness and Warren's invocation of the Fifth Amendment added more weight to the government's case because the jury was forced to rely on the testimony of a dubious witness.

[18] The court must make two inquires when determining whether reversible error occurred as a result of a witness' invocation of his Fifth Amendment rights. First, error may occur due to prosecutorial misconduct if the government makes a flagrant attempt to build its case on inferences arising from the assertion of the privilege. *United States v. Victor*, 973 F.2d 975, 979 (1st Cir. 1992). Second, error may occur if the refusal to answer adds considerable weight to the government's case. *Id.* Garcia relies on *United States v. Quinn*, 543 F.2d 640, 650 (8th Cir. 1976) which deals with a government witness asserting the Fifth Amendment.

[19] In the case at hand, Warren was not a government witness. Therefore, neither the court nor the government violated Garcia's right to cross-exam Warren. We decline to extend existing case law to include rebuttal

witnesses called by the defense. Since Garcia's right to cross-examination was not violated by either the government nor the court we find the district court did not err when it refused to grant Garcia's motion for a mistrial.

V.

[20] Urrego asserts that during voir dire, which occurred on April 13, 1992, the court made a comment that could allegedly be construed as improperly characterizing the burden of proof required for a conviction which resulted in a denial of due process.

The record shows that the court stressed during its preliminary instructions to the jury that the burden of proof is always on the government. However, the Court also made the following comment which forms the basis of Urrego's complaint:

> Today is a great week for the exercise of all sorts of duties of citizenship, especially for you. You have jury service on Monday, you can vote on Tuesday, and you can pay your income taxes on Wednesday, and you can go to church on Friday and Sunday of Easter Holy Week and pray that you made all the right decisions and pray that you properly accounted for your taxes.

Defense counsel expressed concern with this statement and discussed the matter with the Court. The Court agreed with counsel that the comment was inappropriate.

[21] When the case went to the jury on April 22, 1992, the jurors were given detailed instructions on the presumption of innocence and the burden of proof. It is presumed jurors follow their instructions. *United States v. Villarreal*, 963 F.2d 725, 729 (5th Cir.), *cert. denied*, — U.S. —, 113 S.Ct. 353, 121 L.Ed.2d 267 (1992) (citing *Richardson v. Marsh*, 481 U.S. 200, 206, 107 S.Ct. 1702,

1706-07, 95 L.Ed.2d 176 (1987)).

Defendant contends this statement affected the jury's consideration of the burden of proof because although the jurors were given a proper instruction concerning proof beyond a reasonable doubt, the invitation to pray set a different standard. Urrego argues that this standard is base on the individual jurors' concept of God and whatever expectations must be satisfied within that context. An invitation to pray implies that the person in authority in the courtroom believes there is a standard of judgment outside the courtroom and outside the standard that is to be applied by them according to the law.

The Court has carefully reviewed the record on this issue. Eleven days passed from the time the preliminary statement was made and the case went to the jury. Any error which may have occurred as a result of this casual remark was cured by the passage of time and the district court's detailed instruction on the presumption of innocence and the burden of proof. There is no evidence that the statement in question deprived Urrego of a fair trial.

VI.

[22] Finally, Urrego contends he was denied his right to due process because the district court denied his motion to dismiss based on outrageous government conduct. Urrego claims that after Officer Warren had sex with Cruz during her interrogation he told her that she had to contact Urrego because if the government could not get anything on him the majority of the blame would fall on her. Cruz called Urrego twice from the DEA office. Urrego agreed to wire her $200 and meet her at the Marriott Hotel in Corpus Christi. When Urrego arrived, Cruz was instructed by the DEA to get him to talk about the drugs in the car. She was unsuccessful. Defendant argues that this Court should invoke its supervisory powers and set aside the district court's order

denying the motion to dismiss.

[23] The underlying purpose of these inherent supervisory powers are to 1) implement a remedy for a violation of a recognized right, 2) to preserve judicial integrity by insuring that the conviction rests on appropriate consideration validly before the jury and 3) as a remedy designed to deter further illegal conduct. *United States v. Hasting*, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). Urrego contends Warren took advantage of his position and abused the authority intrusted to him. He believes that moments after the first sexual act Warren set in motion activities which caused Urrego to travel to Corpus Christi where he was arrested. Urrego argues that the harm increased when the government used Cruz, the most detrimental witness against him, as a witness when it had knowledge of the misconduct.

[24,25] "Reversals of convictions under the court's supervisory power must be approached "with some caution." *United States v. Payner*, 447 U.S. 727, 734, 100 S.Ct. 2439, 2445-46, 65 L.Ed.2d 468 (1980). In addition, "[s]upervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error." *Hasting*, 461 U.S. at 506, 103 S.Ct. at 1979.

Cruz testified that she would have assisted the government without the sex and there is no evidence that either the government or the Court sanctioned Officer Warren's conduct. An official investigation was initiated to determine if criminal charges were warranted and the Court chastised the DEA for allowing the situation to occur. Furthermore, the evidence used against Urrego was independent of the sexual activity. It included the materials taken from his brief case, telephone records and toll receipts. This Court concludes that this is not a case where it is

necessary for it to exercise its supervisory powers.

For the foregoing reasons, the judgment of the district court is AFFIRMED in all respects.

APPENDIX C

UNITED STATES of America,
Plaintiff-Appellee,

v.

Ellis Ray THOMAS, a/k/a Number 7, Jerry Thomas Maxwell, Steven Darrel Gregg, Modesto Serna Sanchez, Jr., a/k/a Number 6, and Roy Lee Hodgkiss,
Defendants-Appellants.

No. 91-8583.

United States Court of Appeals,
Fifth Circuit.

Jan. 25, 1994.

Order Granting Rehearing Feb. 25, 1994.

Defendants were convicted in the United States District Court for the Western District of Texas, Walter S. Smith, Jr., J., of various narcotics offenses, and they appealed. The Court of Appeals, Emilio M. Garza, Circuit Judge, held that: (1) evidence established existence of single conspiracy; (2) evidence supported convictions; (3) remand was required to determine whether notes prepared by federal agent who debriefed several plea-bargaining defendants were *Brady* material; (4) officer who stopped defendant's vehicle had probable cause to search vehicle; (5) prosecutor did not improperly bolster credibility of government witness during closing argument; and (6) defendant received sufficient notice that government intended to seek sentence based on quantity of drugs involved.

Affirmed in part and remanded.

1. Conspiracy 47(12)

Evidence in narcotics conspiracy prosecution established existence of single conspiracy, as alleged in indictment, rather than multiple conspiracies, though defendants did not know identity of other members of conspiracy; jury could have inferred that defendants had common goal of distributing illegal drugs for profit, that they knew they were part of larger venture, and that activities of each conspirator were advantageous to success of overall venture. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

2. Conspiracy 24(1), 27

"Conspiracy" is agreement by two or more persons to commit one or more unlawful acts and overt act by one of the conspirators in furtherance of the conspiracy.

See publication Words and Phrases for other judicial constructions and definitions.

3. Conspiracy 47(1)

Conspiracy conviction must be upheld if any reasonable trier of fact could find beyond reasonable doubt that conspiracy existed, that each codefendant knew of conspiracy and that each codefendant voluntarily joined it.

4. Indictment and Information 171

"Material variance" occurs when variation between proof and indictment occurs, but does not modify essential element of offense charged.

See publication Words and Phrases for other judicial constructions and definitions.

5. Criminal Law 1167(1)

If material variance between proof and indictment occurs, Court of Appeals determines whether defendant has been prejudiced by it using harmless error analysis.

6. Conspiracy 24(2)

Whether evidence, or reasonable inferences drawn therefrom, proves one or more conspiracies turns on following elements; time period involved; persons acting as co-conspirators; statutory offenses charged in indictment; nature and scope of criminal activity; and places where events alleged as conspiracy took place.

7. Conspiracy 24(8)

Jury may find defendant guilty of conspiring with unknown persons where sufficient overlap of personnel occurs, i.e. if